U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

DATE: APR 19 1989
CASE NO. 88-INA-164

In the Matter of

SWITCH, U.S.A., INC.,
Employer

on behalf of

SHLOMO PERETZ,
Alien

Lisa K. Zakar, Esq.
Los Angeles, CA
For the Employer

BEFORE: Litt, Chief Judge; Brenner, Tureck, Guill and Williams
Administrative Law Judges

JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER

This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(14) (hereinafter "the Act"). The Employer requested review from a U.S. Department of Labor Certifying Officer Paul R. Nelson's denial of a labor certification application pursuant to 20 C.F.R. § 656.26[1]

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive a visa unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

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[1] All of the regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of Part 656 of the regulations have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means, in order to make a good faith test of U.S. worker availability.

This review of the denial of a labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties [see § 656.27(c)].

Statement of the Case

On October 23, 1986, the Employer filed an application for alien employment certification (AF 24) to enable the Alien to fill the position of Inventory Controller. Employer, which is located in Los Angles, California, is a clothing manufacturer. The only requirement was six months experience in the job offered, which consisted of compiling records on the number, size, color and style of the items manufactured.

Following the issuance of the Notice of Findings ("NOF") by the Certifying Officer ("CO") on September 18, 1987 (AF 17-18), and the filing of Employer's rebuttal on October 10, 1987 (AF 4-16), the Final Determination denying certification was issued on October 30, 1987 (AF 2-3).

Discussion

The bases for the CO's proposed denial of the labor certification as set forth in the NOF were lack of a bona fide job offering and "rejection of U.S. workers." (AF 18). In regard to the former, the CO noted that:

> There is some question that a current job opening exists to which U.S. workers could be referred, or that there is a current existing business operated by the Employer.

Employer was instructed to show that there is an on-going business. In addition, the CO stated that a U.S. worker, Daniel Kwong, was rejected for the job despite being both qualified and available (id.).

In its rebuttal, the Employer presented evidence which satisfied the CO that it was a viable business. In regard to Mr. Kwong's application, the Employer stated:

> The confusion regarding the employment status of Mr. Daniel Wai-Kin Kwong results from the fact that it was not possible to contact Mr. Kwong directly, as he was never available when his house was called. His wife answered the telephone and has great difficulty with the English language. She was understood to have said that her husband was employed at the time the call was made. Mr. Kwong was again contacted on 10/9/87 to reevaluate his employment status. He indicated that he is still unemployed,

> however he is currently studying business in the evenings and in fact, left his previous job as occasional overtime interfered with his studies. His ultimate goal is a business-related job, not strictly clerical. It seems apparent that Mr. Kwong would use this job as a stepping-stone while continuing his studies to pursue a business career. Our need is for a permanent inventory controller (AF 4).

The CO based the denial of certification on his determination that the Employer had failed to provide documentation that a U.S. worker was not available for the job opening (AF 3).

The issue for resolution is whether the Employer has documented that it rejected U.S. worker Daniel Kwong for lawful job-related reasons, as required by § 656.21(b)(7). The evidence of record (AF 19-59) shows that the job was advertised in November and December, 1986 and that Mr. Kwong applied. He explained that he was then working as an inventory control clerk. In summarizing its recruitment for the State Employment Development Department, Employer stated that "Mr. Kwong is also presently employed and is not looking for new employment." (AF 31) However, in its rebuttal to the NOF, Employer stated that it obtained this information from Mrs. Kwong, who does not speak English very well (AF 4). Further, in response to a DOL questionnaire, the applicant indicated he would have taken the job if it had been offered to him. (AF 21).

We have previously held that an employer who wants to consider an applicant seriously must go further than merely speaking to the applicant's spouse by telephone. In re Dove Homes, Inc., 87-INA-680 (May 25, 1988) (en banc). Since the Employer did not contact the applicant during its job recruitment, and, based on a subsequent telephone call with the applicant, appears to concede that the applicant would have taken the job, as he indicated in the questionnaire (see AF 4), the applicant clearly was available.

Employer's unfounded speculation that the applicant would have used the job as a stepping-stone while continuing his studies to pursue a business career is insufficient to establish the applicant's lack of availability.

The evidence shows that Mr. Kwong was an able, willing, qualified and available U.S. worker, but Employer failed to offer him the position. Accordingly, alien labor certification cannot be granted.

ORDER

The determination of the Certifying Officer denying the Employer's application for labor certification is AFFIRMED.

For the Board:

JEFFREY TURECK
Administrative Law Judge

Washington, D.C.
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